STATEMENT OF

JAMES V. DeLONG

SENIOR FELLOW & DIRECTOR
CENTER FOR THE STUDY OF DIGITAL PROPERTY
PROGRESS & FREEDOM FOUNDATION
WASHINGTON, DC

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON COMMERCE AND ENERGY
SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

ON

PROTECTING PROPERTY RIGHTS AFTER KELO

OCTOBER 19, 2005

James V. DeLong
Progress & Freedom Foundation
1444 Eye St., NW -- Suite 500
Washington, DC 20005
202-969-2944 Direct
202-289-8928 Main
jdelong@pff.org
www.IPcentral.Info
www.pff.org

It is a pleasure to be here today to discuss the implications of the Supreme Court decision in *Kelo v. New London*,[1] a case which has triggered a Katrina-like deluge of reaction and criticism.

I have four points to make to the Committee today. Let me state them, then go back and elaborate on each.

(1) Given the existing case law, the decision in *Kelo* was not a surprise..

(2) As property rights horror stories go, *Kelo* is second-rank. Ms. Kelo got paid for her property; there are uncounted numbers of regulatory takings for which no compensation is paid.

(3) The strong public reaction of antipathy to the result in *Kelo was* a surprise -- a pleasant and, hopefully, productive one.

(4) One's understanding of the implications of *Kelo* is enriched by viewing it in a more general context that includes rights to intangible and intellectual property as well as to real estate.

These points are taken up in order.

(1) Given the existing case law, the decision in *Kelo* was not a surprise.

To recapitulate the basic issues, a clause of the Fifth Amendment to the U. S. Constitution says "nor shall private property be taken for public use, without just compensation." The phrase "public use" has always been regarded as a limitation on governmental power to take property; that is, it has been assumed by judges and scholars that government has no power to take property for private use -- to take from A to give to B -- even if compensation *is* paid.[2]

So, the question in *Kelo* was whether some houses could be condemned by the city pursuant to a redevelopment plan for a part of New London even if the houses could in no way be classified as public nuisances or part of a blighted area, and even if the use to which the land was to be devoted involved transfer to a private developer.

A five-member majority of the Supreme Court upheld the validity of the city's action, emphasizing the fact that it was part of an overall redevelopment plan, not an individualized action, and that the city's conclusion that the overall public weal would be served by the plan was not unreasonable.

---

[1] 125 S. Ct. 2655 (2005).

[2] The Supreme Court cases usually cited for the "no transfers from A to B" are collected in H. Christopher Bartolomucci, Statement on H.R. 3405 Before the Committee on Agriculture, U. S. House of Representatives, Sept. 7, 2005. Most of these are from the 19th or early 20th centuries, and the validity of such pre-New Deal constitutional precedents is dubious, to say the least, but they are still quoted by the Court in *dicta* so apparently they remain valid in the collective minds of the Justices.

The most surprising thing about this conclusion was that it was by a 5 to 4 vote; ahead of time, I had thought that under the existing case law this result would be reached far more decisively.

In 1997, I published a book entitled *Property Matters: How Property Rights Are Under Assault--And Why You Should Care* (Free Press, 1997). It is still in-print and available on Amazon, but if you seek illumination on this point of the meaning of "public use," you are out of luck. The reason is that the Supreme Court cases, stretching back over at least half a century, appeared to make the public use requirement a dead letter -- if the government exercising condemnatory powers decided the use was public, that was conclusive.

As the Supreme Court summed it up in 1992, in *NRPC v. Boston & Maine Corp.*:[3]

> We have held that the public use requirement of the Takings Clause is coterminous with the regulatory power, and that the Court will not strike down a condemnation on the basis that it lacks a public use so long as the taking "is rationally related to a conceivable public purpose."

The power granted government by such a test is almost total. As Justice Scalia has pointed out, and Justice O'Connor reiterated in *Kelo*, a rational basis test should be renamed "the stupid staffer" test -- any legislative or executive branch staffer who cannot dream up a chain of logic that meets it, no matter how outrageous the government action, is too dumb to hold his or her job.[4]

If *Boston & Maine* was not sufficient to establish that the "public use" requirement was a paper tiger, then *Lingle v. Chevron*,[5] decided a mere month before *Kelo*, should have finished the job. In some prior cases, the Court had indicated that assessing a claim that a regulatory taking had occurred -- a regulation so intrusive that it should be treated as a "taking" under the Fifth Amendment even though title did not pass -- it would look at whether the regulation "substantially advance[d] legitimate state interests." In *Lingle*, it repudiated the applicability of this test to a takings claim. The logical conclusion to be drawn was that for takings of any sort, the Court was getting itself out of the business of assessing the legitimacy of the purpose of the exercise of power.

In *Kelo*, the four dissenters retreated considerably from such total deference. Even the majority went to some pains to justify the rationality of the city's action, focusing on its status as part of an overall plan rather than a random regulatory act.

In sum, on this issue of the meaning of "public use," *Kelo* contains a significant verbal retreat from the sweeping deference to governmental action exhibited in the prior cases. It

---

[3] 503 U.S. 407, 422 (1992). There were dissents in the case, but not from this language.

[4] Kelo, 125 S. Ct. 2655, 2671, 2675 (2005) (O'Connor, J. dissenting); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025-1026, n.12

[5] 125 S.Ct. 2074 (2005).

indicates some degree of judicial uneasiness with what the courts have wrought. The retreat may be no more than verbal, since the majority of the Court seemed willing to accept as a "public use" anything that claims an economic development rationale, including higher tax production. As Justice O'Connor said, it is difficult to see how any competent staffer could fail to pass this test, but it is possible that a future case will erect some substantive structural limitations on this verbal foundation.

It is instructive to compare *Kelo* with the recent decision of the Michigan Supreme Court in *County of Wayne v. Hathcock*, which reversed the famous, and infamous, 1981 *Poletown* decision.[6]

In *Poletown*, the Michigan Supreme Court had allowed the destruction of a vibrant ethnic community to clear land for an auto assembly plant. The decision applied a test similar to that used by the majority in *Kelo*: that the "public use" requirement allowed a project designed to "alleviat[e] unemployment and revitalize[e] the economic base of the community." In overruling this decision, *Hathcock* repudiated this test, and said that a transfer of property from one private party to another meets the public use requirement under only three conditions:

> (1) "The project generates public benefits whose very existence depends on the use of land that can be assembled only by the coordination of the central government." This applies primarily to infrastructure projects -- roads, railroads, pipelines -- which present particularly acute hold-out problems.
>
> (2) Situations in which the private entity remains accountable to the public, and (possibly -- it is a bit unclear) the property remains available for use by the public. Again, infrastructure is the prime example. (This may actually be an add-on to the first point -- this, too, is a bit unclear.)
>
> (3) Clearing a blighted area, if the clearance is the primary purpose and the transfer is incidental.

The *Hathcock* standards most emphatically *do not* include wholesale condemnation of land for the purpose of letting a developer erect an "office park," or "tech center," or any other buzzword *de jour*. The court noted:[7]

> [T]he landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe . . . that these constellations required the exercise of eminent domain or any other form of collective public action for their formation.

However, it is not clear that the Michigan Supreme Court would refuse to uphold the use of eminent domain to take unblighted property within a generally-rundown area, and it is

---

[6] County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W. 2d 765 (Mich. Sup. Ct. 2004); Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 304 N.W. 2d 455 (Mich. Sup. Ct. 1981).
[7] 684 N.W. 2d at 783-84.

entirely possible that it would have decided *Kelo* the same way as the U.S. Supreme Court, albeit after applying a different test. In *Kelo*, New London was "not confronted with the need to remove blight in the Fort Trumbull area, but [its] determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference."[8]

(2) As property rights horror stories go, *Kelo* is second-rank. Ms. Kelo got paid for her property; there are uncounted numbers of regulatory takings for which no compensation is paid.

As the above mention of *Lingle* indicates, the outcome in *Kelo* was also foreshadowed by the trend of the Court's decisions in cases involving "regulatory takings," situations in which government does not take title, but regulates the use of property significantly, often appropriating not just the juice but the pulp, and leaving the landowner the worthless rind.

Indeed, Susette Kelo was not treated as badly as many other people. She at least got paid for her property.[9] Uncounted others have lost most or even all of their rights via regulatory takings with no recompense whatsoever. As long as a government avoids actual physical seizure, and as long as it avoids a complete destruction of economic value, it can inflict huge losses on property owners. It can, in essence, seize their property for public or private benefit with no payment whatsoever. [10]

Perhaps Ms. Kelo should be grateful that New London did not zone her land to make it into an open space, or declare it an endangered species habitat, or find a wetlands plant, or classify her house is a historic structure that cannot be changed and must be maintained at the expense of the owner (no "demolition by neglect"), or decide that building on a lot she bought years ago would cause unacceptable runoff into the Atlantic Ocean. Any of these could result in a de facto taking without compensation.

If Ms. Kelo owned an apartment building, it could be made subject to rent control, which would transfer most of the value to the tenants. If she owned a small business, it could be subjected to price controls. If she wanted to change the use of a commercial structure, she could be forced to pay exorbitant "impact fees."

If Ms. Kelo lived in the western United States, where the Federal government owns more than half the land, and in theory holds it in trust as a commons to which the people of the area are to have reasonable access, she would find her access rights squeezed away, year by year and right by right, by a hostility to the all productive uses of the land, ranging from lumbering to mineral extraction to ranching to farming. The result has been

---

[8] 125 S. Ct. at 2665-66.

[9] However, newspaper accounts over the summer said that the New London Redevelopment Authority is taking the position that the compensation due Ms. Kelo should be set at the property's value as of the original notice of taking five years ago (apparently without interest), and that she should also pay rent for the time she occupied the house during the litigation, with the rent adjusted upward to reflect the inflation in property values. The accounts were not terribly clear, however.

[10] James V. DeLong, *Property Matters: How Property Rights Are Under Assault--And Why You Should Care* (New York: 1997), *passim*.

destruction of large numbers of psychologically and economically rewarding jobs, along with the communities and ways of life that depended on them. She would not be losing a legally-recognized property right; but the principle of reasonable access to the Federal commons was one of the basic bargains of western settlement.

(Here it is necessary to put in an aside. There is no conflict between reasonable environmental protection and viable natural-resource-dependent industries and communities. For example, I once saw the great East Texas Oil Field, and it was mostly cows, grazing among an occasional pump. There *is* a conflict between these industries and environmental protection as a fundamentalist religion, which maintains the view that any productive use of the earth represents a criminal rape of the planet.)

The list of possible regulatory exactions is exceedingly long. And if Ms. Kelo tried to protest any of these exactions in court, she would run into a hedgerow of delaying tactics and arcane legal doctrines about "exhaustion of remedies" and "ripeness" cynically deployed to exhaust her psychologically and financially, and prevent effective enforcement of the few rights that she possessed.

As constitutional scholar Roger Pilon said recently before the House Committee on Agriculture:[11]

> [In the] classic regulatory takings case, of course, the government takes uses, thereby reducing the value of the property, sometimes drastically, but refuses to pay the owner for his losses because the title, reduced in value, remains with the owner. Such abuses today are rampant as governments at all levels try to provide the public with all manner of amenities, especially environmental amenities, ''off budget.'' There is an old-fashioned word for that practice: it is ''theft,'' and no amount of rationalization about ''good reasons'' will change the practice's essential character.

The Supreme Court has occasionally nullified a particularly outlandish regulatory taking, but for the most part it has acquiesced in serious erosion of the principle that private property should not be taken without just compensation, even when the purpose of the government action is to produce a public benefit rather than to avoid some noxicity caused by the landowner.

The Court regularly states, but then ignores, the lodestar principle that the Takings Clause of the Fifth Amendment is "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."[12]

---

[11] Roger Pilon, Statement Before the House Committee on Agriculture on Strengthening the Ownership of Private Property Act of 2005, U. S. House of Representatives, Sept. 7, 2005, p. 4.
[12] Armstrong v. United States, 364 U.S. 40, 49 (1960).

(3) The strong public reaction of antipathy to the result in *Kelo was* a surprise -- a pleasant and, hopefully, productive one.

On the other hand, the strong public reaction to *Kelo* has indeed been a surprise, and a pleasant one. It is also a bit of a mystery. None of the prior cases or the exactions by governments that triggered them roused serious interest from the public, the media, or the Congress, despite the tantrums that some of us threw. Books on the topic had little impact.[13] OpEd editors yawned. I cannot remember the last time Congress held serious hearings on the issue. If any did occur, they received no press attention.

Explanations as to why *Kelo* hit the collective nerve can be only speculation, of course, but I think three main factors are involved.

The first is the nakedness of the city's assertion of its right and intent to engage in massive central planning, and to exercise unlimited power in pursuit of its vision. This power existed in law, but the demonstration of its reality shocked most people, who were unaware of the extent to which their legislatures have endorsed, and courts have upheld, an ideology of central planning that dominates municipal government.

Oh, everyone knew that cities have master plans and all that sort of thing -- newspapers are always yapping about them -- but no one took these seriously. People assumed that these plans are a glorified name for zoning, of which everyone approves, at least in theory. Zoning keeps the heavy industry away from the houses, ensures that commercial enterprises are located on the main roads, and in general protects property values.

Thus the idea that the New London or any other city could choose to remake its map by fiat was a surprise to most people. The public had assumed that city action, such as zoning, was designed as an adjunct of a regime that depends on and defends private property rights. It was not contemplated that city action would supplant the private sector.

A second major factor is that the abuse of eminent domain, by which I mean the taking from A to give to B, has become exceedingly common. Dana Berliner of the Institute for Justice reported on this in a report on *Public Power, Private Gain*: in the five years 1998-2002, there were over 10,000 documented cases of filed or threatened condemnations designed to benefit private parties. And this figure covers only the instances that reached the newspapers; the actual total could be 10 or 20 times as great.[14]

---

[13] The classic work is Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: 1985). Two excellent works that came out about the same time as my book, *Property Matters: How Property Rights Are Under Assault--And Why You Should Care* (New York: 1997), were Richard Pipes, *Property and Freedom: The Story of How Through the Centuries Private Ownership Has Promoted Liberty and the Rule of Law* (New York: 1999), and Tom Bethell, *The Noblest Triumph: Property and Prosperity Through the Ages* (New York: 1998).

The definitive legal treatise is Steven J. Eagle, *Regulatory Takings* (3d ed.)(New York: 2005), and a useful look at the cases is Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land Use Regulation* (New Brunswick: 1997).

[14] Dana Berliner, *Power, Private Gain: A Five Year State-By-State Report Examining the Abuse of Eminent Domain*. Castle Coalition (April 2003), p. 2. To get some idea of the relationship

There may have been a pause in the pace of such actions while *Kelo* was pending, but now, with their power to issue the takings equivalent of *lettres de cachet* reaffirmed by the Supreme Court, localities are making up for the lost time.[15]

At some point, such activity reaches a level where everyone knows someone who has been affected. Then, the possibility ceases to be an abstract misfortune that threatens someone far away and becomes a personal threat. We may have reached such a tipping point. I certainly hope so.

A third major factor is the growing distrust of government's competence and good faith as a central planner and real estate developer.. No one believes that the asserted unlimited authority to remake the urban terrain will be exercised in some spirit of abstract *pro bono publico*. Real estate development, in most times and most places, is and always has been a sinkhole of corruption and special influence.[16] The public knows this full well. But the public thought that it was protected from the direct effects of these dreary realities. Now it has learned that it is not. If someone with influence decides he wants your property, he can take it, through your local city council.

The most recent issue of *Reason* describes such a scenario. A state agency, acting in concert with a developer and a large corporation, used eminent domain to seize land needed for a new 52-story corporate headquarters. No effort to purchase the land was made, but, under cover of the need to eliminate "blight," 11 buildings were seized and 55 businesses evicted, including "a trade school, a student housing unit, a Donna Karan outlet, and several mom-and-pop stores." The property was bought at a bargain price, and if the legal settlements with the original owners and tenants exceed it, the state agency will be on the hook. In addition, the city and state offered the corporation $26 million in tax breaks for the project.[17]

The corporation was the *New York Times*, which, not surprisingly, quite liked the *Kelo* decision. According to *Reason*:

> [T]the *Times*, in an editorial entitled “The Limits of Property Rights,” let out a lusty cheer. *Kelo*, the paper declared, is “a welcome vindication of cities’ ability to act in the public interest” and “a setback to the ‘property rights’ movement, which is trying to block government from imposing reasonable zoning and environmental regulations.”

---

between reported and actual cases, Berliner checked the numbers for Connecticut, the only state that keeps systematic track of such cases. During the 5-year period, Connecticut courts recorded 543 redevelopment condemnations whereas only 31 were reported in the newspapers.
[http://www.castlecoalition.org/report/pdf/ED_report.pdf]

[15] Dana Berliner, Statement Before the Committee on Agriculture, U. S. House of Representatives, Sept. 7, 2005.

[16] See Richard Babcock, *The Zoning Game* (Univ. of Wisconsin Press: 1966).

[17] Matt Welch, "Why the New York Times Loves Eminent Domain," *Reason* (Oct. 2005), p. 18 [http://www.reason.com/0510/co.mw.why.shtml]

Dana Berliner's *Public Power, Private Gain* is full of similar tales, and Professor Jonathan Turley recently summarized more examples of takings that have been upheld by courts as legitimate "public uses." Included are condemnations of:[18]

> Property of six different private owners of lots in Manhattan to allow the New York Times to expand and to construct a more valuable array of condos and galleries.
>
> Property next to Donald Trump's casino so that he could have a waiting station for limousines. (This was ultimately overturned)
>
> A lease held by a company in a shopping center in Syracuse to allow the owner to redevelop the property free of its obligations under the leasehold.
>
> Property in Kansas for the sole purpose of attracting a new and more promising business to the area.
>
> Minneapolis property held by one business to give to another to develop, despite the interest of the original owner in developing the property in a similar fashion.
>
> A Walgreens drug store in Cincinnati to build a Nordstrom department store, which then required condemnation of a CVS pharmacy to relocate the Walgreens, which then required condemnation of other businesses to relocate the CVS. (The deal then fell apart, and as of 2003 the Nordstrom's site was a parking lot.)
>
> A parking lot in Shreveport to give it to another business for use as a parking lot.

Granted, the dispossessed owners are supposed to be compensated, but this will not pay for moving, or for disrupting their lives. And compensation is often inadequate on any scale.

There is a broader point to be made here. It would be incorrect to classify the Founders of this nation as cynics. But they were indeed realists, and they did not trust government. It is not that government officials are any worse than anybody else -- it is that they are no better. Officials are tempted by offers of political support, and sometime by outright corruption.

The Founders did not have the vocabulary of "public choice" and "rent seeking" that characterizes contemporary discussions of political theory,[19] but they certainly understood the basic concepts. The *Federalist Papers* are a long meditation on the implications of public choice theory for practical government.

---

[18] Prof. Jonathan Turley, "Eminent Domain and the Supreme Court's Public Use Doctrine," Statement on H.R. 3405 Before the Committee on Agriculture, U. S. House of Representatives, Sept. 7, 2005

[19] See, *e.g.*, Fred S. McChesney, *Money for Nothing: Politicians, Rent Extraction, and Political Extortion* (Harvard Univ. Press: 1997).

And even the most upright of public officials are vulnerable to the potent seductions of power. The idea "we can remake this city!" can be irresistible.

Of course, such efforts rarely work. Cities are organisms, not machines, and they evolve and grow. For the most part, rigid plans are never implemented. And even when the plans are executed, we usually regret it. It turns out that one decade's urban planning fad is the next decade's candidate for demolition. And in the meantime private initiative is paralyzed by the dithering that accompanies broad land-use initiatives.

Part of the genius of the Founders was their recognition that government is simply one part of that entirety that we call a civilization or a culture. It is important that government officials recognize this, and recognize that it is not their job to be responsible for everything, and it is not true that nothing good can happen that they do not direct. Quite the contrary; their job is to establish the conditions that make it make it possible for the other institutions of society to function. (Or, to phrase this more negatively, their job is to avoid making it impossible for other institutions to function.)

Hence, as the Fifth Amendment provides, government officials are to have the power to acquire property needed for public uses, but it is not necessary for government to take on itself the responsibility for "shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce," in the words of the Michigan Supreme Court.

The perspective represents not just the view of the Founders, but the contemporary good sense of the American people, "90% of [whom, according to polls] disapprove of the kind of seizures allowed by *Kelo*."[20]

In other words, the American people think that the virtues of the free market and its invisible hand attach to land use as well as to other economic activities. The people are content with the idea that government does not bear total responsibility for urban perfection, and that for the most part we will, rightly, let our urban spaces grow organically.

But one place that has not gotten the word about this is the Supreme Court. The Justices are still back in the New Deal era, or perhaps even the Progressive Era, when the idea that the government is responsible for everything, and hence must PLAN, came to dominate political theory. The governmental Platonic Guardians depicted in Supreme Court opinions bear little resemblance to the officials of Richard Babcock's books on zoning, or to the decision-makers in situations cited by Dana Berliner, or with the common sense of the American people.

A Lexis search of Supreme Court opinions for the phrases "public choice" and "rent seeking" produced zero results. This result is quite extraordinary. Two concepts that are fundamental to any realistic analysis of government, its problems, and its control are absent from authoritative legal thought. *Of course* the Supreme Court's treatment of Takings has become incoherent hash -- it is impossible to analyze something adequately

[20] The Economist, *Hands Off Our Homes*, Aug. 20, 2005.

if one has barred oneself from using the intellectual tools required to deal with it in a serious way. On this issue, there is a wide gap between the perceptions of the Court and those of the people -- with the latter having by far the more sophisticated understanding of applied political science.

(4) One's understanding of the implications of *Kelo* is enriched by viewing it in a more general context that includes rights to intangible and intellectual property as well as to real estate.

There is, I think, a final reason that Kelo has struck the nerve of the American people -- the growing attention commanded by issues involving intellectual property.

During the past five years or so, the nature and importance of intellectual property -- the debate over the level of hegemony that should properly be exercised over the creations of the mind -- has received a tremendous amount of attention, in the media and in the venues in which national attitudes are truly determined: conversations in car pools, at parties, and around office water coolers.

Economic value in the contemporary world has become far more dependent on the creations of the mind than on bricks and mortar or the real estate on which they stand, and several high-profile controversies have driven this point home -- for example, the Microsoft antitrust case, P2P file-sharing, reimportation of pharmaceuticals, the telecom bust (which resulted largely from the confusion over property rights created by the implementation of the 1996 Telecommunications Act).[21] The whole computer/high tech industry depends on intellectual property rights in the form of the patents and copyrights without which no firm could attract investment capital.

I think the increased prominence of intellectual property is causing people to refocus on property rights in general, and to realize that any trend of events that undermines the security of all property is not good.

About four years ago, I attended a panel session in which representatives of the entertainment industry, mostly from Los Angeles, expressed concern about the rise of unauthorized file sharing of music, and bemoaned the lack of respect for property rights shown by the sharers.

During the question period, I said to the panelists: "Look, there has not been an uncompensated taking of real estate in the last 20 years that you entertainment industry people have not endorsed, as long as it could be justified in the name of endangered species protection, or wetlands, or open space.[22] You have taught a generation of young

[21] One can argue with some cogency that telecom networks should be classified as physical rather than intellectual property. But the whole industry is so dependent on technological innovation, from the technologies for making optic fiber to the software that runs the network, that it seems reasonable to include this area in the list. It also serves to make the point that tangible and intangible property, and property rights, are becoming inextricably mixed.

[22] Actually, this was not completely true. Some in the entertainment industry have objected strenuously to having public access rights of way created across their Malibu beachfront properties.

people to hold property rights in contempt, and now you object that they are practicing exactly what you preached."

For the most part, the reaction was blank looks. What could the one possibly have to do with the other?

That reaction has changed. Now, there is general agreement that property rights must be treated on a continuum, that the basic philosophical principles supporting property rights as an institution are constant across both tangible and intangible property, and that an attack on one kind of property cannot be quarantined from an attack on all.

The list of *amici* supporting the importance of the intellectual property rights in the recent *Grokster* case contains not just the Progress & Freedom Foundation, but the Defenders of Property Rights, represented by former Solicitor General Theodore B. Olson. DPR has long been one of the staunchest defenders of rights in physical property.

The most recent evidence of this evolution of attitudes is the creation of a group called The Property Rights Alliance,[23] which is bringing together a Noah's Ark of property rights interests -- inventors concerned with patents; content industries concerned with file-sharing; cable companies concerned with must-carry rules; land-rights groups devoted to maintaining access to the commons of the public lands; land-owners whose property has been taken by the Endangered Species Act; victims of rent control; and so on.

By no means do the members of this alliance hold any unified positions, and in some cases they are quite opposed. But for those of us who have long regarded property rights as a crucial block in the structure of political freedom and economic progress -- the "guardian of every other right"[24] -- it is tremendously encouraging to see this disparate collection of interests debating the issues in terms of "what is the pro-property rights position?"

In consequence, you in the Congress can expect to hear an increasing number of arguments phrased in terms of their impact on property rights. To take one example, H.R. 1201, Digital Media Consumers' Rights Act of 2005**,** which is pending before this committee, raises profound issues of property rights. In effect, it redefines the rights of creators and consumers by fiat, both prospectively and retroactively. And, just as *Kelo* uses the concept of public benefit as an all-purpose excuse for unlimited governmental power, H.R.1201 uses the concept of fair use to justify a massive redefinition of intellectual property rights. [25]

---

[23] http://www.propertyrightsalliance.org/

[24] "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America*, 4th ed. (New York: 1775), p. 14 (Quoted in John W. Ely, *The Guardian of Every Other Right*, (New York 1992), p. 26).

[25] James V. DeLong, *One Degree of Separation: Kelo & H.R. 1201*, Progress & Freedom Foundation Progress Snapshot Release 1.7 August 2005. [http://www.pff.org/issues-pubs/ps/ps1.7kelo.html]

Conclusion

In *Lynch v. Household Finance Corp*.,[26] the lower court ruled that a particular statute served only to protect "personal" rights, not "property" rights. The Supreme Court rejected this distinction:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. **The right to enjoy property** without unlawful deprivation, no less than the right to speak or the right to travel, **is in truth a "personal" right**, whether the "property" in question be a welfare check, a home, or a savings account. In fact, **a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other**. That rights in property are basic civil rights has long been recognized. J. Locke, Of Civil Government 82-85 (1924); J. Adams, A Defence of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries*138-140 [emphasis added].

Unfortunately, the Supreme Court seems to have forgotten these principles. As in *Kelo*, on questions of the personal right to own and use property it accords almost total deference to governmental authority, deference certainly not accorded in other areas of constitutional protection.

However, as the reaction to *Kelo* shows, and fortunately for the health of the republic, the people of the nation have not forgotten the principle expressed in *Lynch*. Now it is up to the Congress to show that it, too, remembers,

[26] 405 U.S. 538, 552 (1972) .